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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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April 28, 2003

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REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Reply Comments in this proceeding. As a leader in standard and High Definition ("HDTV") digital television, and as an all-digital platform since our inception, EchoStar supports the Commission's efforts in this and related proceedings to spur consumers' further adoption of digital technology. It is our belief in digital television, however, that leads us to conclude that the Memorandum of Understanding ("MOU") crafted by the cable and consumer electronics industry associations, if adopted in its current draft form, would risk throwing the digital baby out with the regulatory bathwater. The MOU is flawed and should be revised. EchoStar agrees with and hereby incorporates by reference the comments of DIRECTV and the SBCA in this proceeding.[1] We wish to underscore and embellish upon several of the points made by those parties.

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[1] See comments of DIRECTV and the Satellite Broadcasting and Communications Association.

I. The Business Plan Approval Process Would Stifle Innovation.

The MOU's proposed approval by the Commission of MVPDs' business plans[2] at best would be a hindrance to innovation and competition, to the detriment of American consumers. At worst, it would turn the clock back to governmental micro-management of private industry's technology and investment decisions. The proposed rule would create a perverse incentive for EchoStar, in order to avoid cumbersome review processes, to develop technology such that new services arguably would lie within the same category of existing, old services. This would undercut Congress' goal, stated throughout the Communications Act, of creating a regulatory environment for technological innovation to thrive.[3]

In practical terms, the rule would have thwarted the development of many EchoStar innovations over the last five years. For example, EchoStar has been a leader in Personal Video Recorder ("PVR") technology, including our new DishPVR 921, the first-ever PVR capable of recording and playing in high definition. We also implemented some of the most sophisticated Electronic Program Guide ("EPG") and interactive applications available in today's MVPD market. If the proposed approval process were in effect, EchoStar probably would not have invested the capital necessary to develop these innovations. Even if it had made such

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[2] See *Cable Compatibility*, Further Notice of Proposed Rulemaking, CS Doc. No. 97-80, PP Doc. No. 00-67, FCC 03-3 (rel. Jan. 10, 2003) ("FNPRM") at Appendix B (proposed section 76.1903, "Interface and Encoding Rules").

[3] *See* Section 7 of the Communications Act of 1934, as amended, 47 U.S.C. §157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.") Indeed, the effort to promote innovation is enshrined in no less a document than the U.S. Constitution, instructing Congress to grant copyrights for the purpose of "promot[ing] the Progress of Science and useful Arts." Const. Art. I (8).

investments, EchoStar would have had an incentive to distort the new services to fit non-regulated categories. We would have balanced the potential lift in new subscribers from a new feature against the competitive harm we would face under the approval process, and may have decided against introducing the new feature.

Specifically, the proposed rules diminish the usual rewards for innovation. Competitors get a transparent preview of innovations in the pipeline and have a chance to react. The longer time-to-market resulting from a Commission approval process would increase the likelihood of obsolescence by the time the new service is introduced, meaning investment cannot be recovered. Competitors, rather than being forced to react in the marketplace with a better mousetrap, instead deluge the Commission with attempts at procedural delay. In short, the MOU's proposed Commission approval process would delay and perhaps even eliminate consumers' beneficial use of technological innovations. This is not consistent with the Commission's goal of bringing digital technology to the American consumer.

II. The MOU Should Not Apply to All MVPDs.

It is too early in the development of the DBS industry for EchoStar to say with certainty whether a Commission-mandated tuner requirement, for example, is the best way for consumers to receive digital broadcasts. Unlike the cable television industry, which traces its history back to the late 1940's and is comprised of incumbent franchisees with largely dated plant and equipment, DBS is a rapidly evolving and technologically facile business. We may at a later date decide that our subscribers and the American public are best served by our accession to the proposed MOU. Today, however, we believe that the MOU should be more narrowly tailored to apply only to cable operators and the consumer electronics manufacturers who crafted the

agreement. This approach, in addition to being more consistent with the list of attendees at the MOU negotiating table, also makes better policy sense.

First, the cable and consumer electronics industries have been able to agree to certain technological standards and protocols, notably DOCSIS, without direct involvement by the Commission. They can do so again with respect to cable compatibility. A failure by industry to arrive at a workable compromise does not mean that the Commission must step in and threaten all MVPD providers with regulation. Rather, as EchoStar and other innovators spur further adoption by consumers of digital technology, the potential economic gains of digital compatibility will motivate the cable and consumer electronics industries to forge agreement and thereby reach new markets. Moreover, if the Commission feels it must threaten industry in order to achieve cable compatibility, it should threaten those who so far have failed: the cable and consumer electronics companies, not DBS.

Second, too much standardization eliminates useful competition. Cable and DBS share many common attributes but are not identical. It is the differences between cable and DBS that spur competition between these two MVPD platforms, best demonstrated by the rollout of digital cable in response to DBS's superior picture quality, features, and channel offerings, all to the benefit of consumers. Cable's residential broadband offerings impel EchoStar and others to devise two-way data solutions for DBS subscribers. The Commission would eliminate important differences between cable and DBS by imposing a one-size-fits-all approach to compatibility, thereby slowing the competitive engine driving innovation by both industries.

Finally, the nature of DBS calls into question whether a compatibility requirement for DBS makes any sense at all. Unlike cable, for which most new and existing homes already are pre-wired, EchoStar's service generally requires a truck-roll for each new subscriber. A dish

must be installed and pointed. A set-top box ("STB") must be activated. Software sometimes must be downloaded. In other words, except in rare cases, someone with a DISH Network uniform must set foot in a new subscriber's home. In this context, where a STB and a professional installer are assumed to be part of every new subscriber's experience, compatibility between the coaxial cable and the television set is not a big issue. An EchoStar subscriber generally does not need plug-and-play -- the installer does all the plugging and the STB does all the playing. Thus, the Commission should amend the MOU by narrowing its applicability only to cable, not all MVPDs.

In its comments, Comcast suggests that unless the MOU is adopted verbatim and applies to all MVPDs, the Commission would in effect grant non-cable MVPDs "*de facto* exclusivity over certain premium digital content."[4] Not so. By tailoring the rules to apply only to cable MVPDs, the Commission would establish competitive market conditions such that *consumers and content providers themselves* could decide who best suits their video viewing and distribution needs. Taken to its logical extreme, Comcast would have the government decide which programmers could show high definition movies and which ones could not; which services a new MVPD competitor could offer and which ones it could not; and which technology companies would have a market for their goods. This is an ironic position for Comcast, a company generally favoring less government regulation of business practices under the banner of free market values.

Comcast also argues that the Commission has legal authority to impose the MOU on all MVPDs, yet tellingly fails to explain how.[5] In fact, one of the statutory provisions cited by

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[4] Comcast comments at 14.

[5] Id. at 13, fn. 19.

Comcast expressly describes the statute's benefits to "cable subscribers," not all MVPD subscribers, intended by Congress.[6] In addition, Comcast describes a *quid pro quo* it believes it has entered, whereby in exchange for its "long and hard" work on this matter, it is entitled to the government's wholesale adoption of its privately negotiated agreement.[7] EchoStar cautions the Commission that by drawing such a connection between the private negotiations and the enactment of the proposed rules, particularly in light of the entire DBS industry's exclusion from the talks, Comcast has called into serious question the legality of adopting the draft rules in their entirety. The mere pretense of notice-and-comment rulemaking, as would be the case under Comcast's proposal, does not ensure compliance with Administrative Procedure Act standards.[8]

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[6] *See* 47 U.S.C. 544a(b)(1) ("the Commission, in consultation with representatives of the cable industry and the consumer electronics industry shall [develop rules] so that *cable subscribers* will be able to enjoy the full benefit of both the programming available on *cable systems* and the functions available on their televisions and video cassette recorders") (emphasis added).

[7] Comcast at 13.

[8] Comcast is essentially saying to the Commission: approve the entire package for no reason other than that all the parts of the package were necessary to reach agreement. But, to adopt in its entirety the agreement reached between the cable industry and the consumer electronics industry without the participation of DBS providers on the ground that this is what was agreed upon is tantamount to a denial of the rights of other interested parties to comment and have their viewpoints considered. This is reversible error. See U.S. v. Nova Scotia Food Products Corp., 568 F.2d. 240 (2d Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered."). *See also generally* Portland Cement Ass'n v. Ruckelshaus, 486 F. 2d 375, 393-394 (D.C. Cir. 1973) ("agency... Has a continuing duty to take a 'hard look' at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant. . . ."). Moreover, a private agreement cannot fetter the power of the Commission to make rules. *Cf.* Talton Broadcasting Co. 67 FCC 2d. 1594, 1598 ¶ 12, n. 12 (1978)("an agreement of the parties as embodied in a consent order is an impermissible means of disposing of transfer of control applications."). *Cf.* Federal Advisory Committee Act, 5 U.S.C., App. 2, Sec. 2(b)(6) ("the function of advisory committees should be advisory only, and . . . all matters under their consideration should be determined, in accordance with the law, by the official, agency or officer involved.").

III. If the Commission Adopts a Standard, It should do so More Flexibly.

The proposed rules are meant to regulate device capabilities in a broad manner, enabling copy protection through the control of device outputs. EchoStar believes that existing standards for digital television display interfaces, including DVI, HDMI, analog component (YPrPb), and IEEE 1394, provide for a wide variety of choice among MVPDs.[9] There are many other standards available, as well, all of which collectively represent the widest possible range of capabilities on a HDTV interface. We find it strange, therefore, that the MOU adopts a relatively restrictive subset of the available standards.[10]

To that end, we suggest amending MOU Section 3.8 to include EIA/CEA-775A and EIA/CEA-849A. Both of these standards enable digital content distribution over 1394. In particular, EIA/CEA-849A supports devices that can handle content streams from cable, DBS, and terrestrial sources. In that same vein, we also suggest that support for EIA/CEA-861 will help ensure compatibility for DVI interfaces, and that support for EIA/CEA-805 should be added for analog component (YPrPb) outputs and inputs.

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[9] DVI/HDMI: EIA/CEA-861 ("A DTV Profile for Uncompressed High Speed Digital Interfaces") (describing how DVI can carry DTV services); EIA/CEA-861-A, EIA/CEA-861-B (follow-on standards describing how DVI and HDMI interfaces can carry additional information); YPrPb: EIA/CEA-770.3-C ("High Definition TV Analog Component Video Interface") (defines 720p and 1080i analog interfaces to HD Monitors or HDTVs); EIA/CEA-805 ("Data Services on the Component Video Interfaces") (describes how data services, including certain copy-control information (CGMA), can be carried across a component video interface); IEEE 1394: EIA-775-A ("DTV 1394 Interface Specification" (describes how DTV services can be supported over a 1394 link); EIA-849-A ("Application profiles for EIA-775A compliant DTVs") (describes support for services that might be sent over an EIA-775A connection). EchoStar is active in industry standards committees and working groups that are responsible for the creation and maintenance of the aforementioned standards.

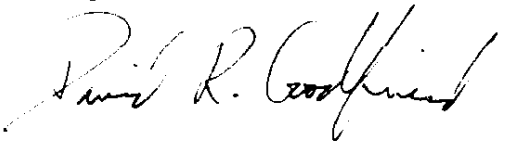
[10] *FNPRM at Appendix B (MOU at Section 3.8, "Obligations of MSOs").*

Finally, the Commission should take account of the efforts in a number of standards bodies and industry groups to develop additional technologies to distribute digital content to consumers. These include MPEG-4, Ethernet, and wireless technologies. It may be that application of these technologies allows EchoStar to further advance the digital transition, and provide more interesting and varied content to our subscribers, without being forced to adopt a standard that soon may be obsolete.

CONCLUSION

EchoStar supports the Commission's efforts in this and related proceedings to spur the digital transition but believes that the MOU is flawed in several key respects. The Commission should not adopt the MOU's draft rules verbatim but rather should eliminate the business model approval process; narrow the rules applicability to consumer electronics and cable providers only, not all MVPDs; and lengthen the list of acceptable digital standards.

Respectfully submitted,



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